

THE TWO TRENDS THAT MATTER FOR PARTY POLITICS

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INTRODUCTION

We are working on a project that begins with two simple observations about the current state of party politics. The first is that the political arena is now dominated by what one of us has called “shadow parties”¹—nominally independent groups that are run by major party insiders and that perform functions that in the past were performed directly by the parties. We’re talking about groups like Organizing For Action (OFA), once run by Jim Messina, or the American Crossroads and Crossroads GPS groups run by Karl Rove. These groups are doing a lot more than buying a few independent ads. They’re also doing voter mobilization, maintaining comprehensive partisan voter databases, employing long-term campaign workers, testing messages, and strategizing about the party’s pitch and message in individual campaigns and across multiple races.²

† Assistant Professor of Law, University of Texas School of Law.

‡ J. Skelly Wright Professor of Law, Yale Law School. Copyright © 2014 by Joseph Fishkin & Heather K. Gerken. What follows is a lightly footnoted, lightly edited, and modestly supplemented version of a discussion delivered by Professor Fishkin at the Brennan Center Convening, *Money in Politics 2030: Toward a New Jurisprudence*. A proper thank you to our research assistants will appear in a forthcoming piece in the *Supreme Court Review*.

¹ Heather K. Gerken, Boden Lecture: The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties, 97 MARQ. L. REV. 903 (2014), available at <http://scholarship.law.marquette.edu/mulr/vol97/iss4/3>. The first section draws heavily from that piece.

² See, e.g., Joe Arnold, *American Crossroads Spending Big in Kentucky*, WHAS11 POLITICAL BLOG (Aug. 27, 2010, 11:21 AM), <http://www.whas11.com/community/blogs/political-blog/American-Crossroads-spending-big-in-Kentucky—101652653.html> (describing American Crossroads’s get-out-the-vote efforts in a Senate race); Edward-Isaac Dove, *OFA Embraces Tea Party Blueprint for August Push*, POLITICO (July 23, 2010, 5:10 AM), http://www.politico.com/story/2013/07/ofa-embraces-tea-party-blueprint-for-august-push-94601_Page2.html (describing OFA’s volunteer recruitment and employment of long-term campaign staff); Derrick Harris, *Obama Seeks Data Scientists for Election Edge*, GIGAOM.COM (Sept. 19, 2011, 3:08 PM), <https://gigaom.com/2011/09/19/obama-seeks-data-scientists-for-election-edge> (describing OFA’s data acquisition and analytics); Nick Judd, *Obama’s Targeted GOTV on Facebook Reached 5 Million Voters*, Goff Says, TECHPRESIDENT (Nov. 30, 2012), <http://techpresident.com/news/23202/obamas-targeted->

The second trend is the flip side of the first. As these nominally independent groups have been on the rise, the formal parties have been waning. As institutions—especially on the Republican side—the formal parties are now quite weak.

To call the parties weak at this particular moment in American political time may seem odd, even counterintuitive. In some ways the parties are stronger now than in living memory. Congress today is extremely polarized along partisan lines. The divide between the parties in terms of both ideology and voting patterns is deeper and clearer than it has been for at least sixty years.³ Being a Democrat or a Republican really means something today—to a degree that it did not during the entire postwar era, when liberal northeastern Republicans and conservative southern Democrats stretched the fabric of each party's big tent. Now, the tents are smaller and there's a lot more space between them.

Like their representatives in Congress, voters have also sorted themselves more coherently by ideology, with almost all the liberals voting Democratic and almost all the conservatives voting Republican.⁴ With moderates in both parties rare and with the

gotv-facebook-reached-5-million-voters-goff-says (describing OFA's voter mobilization efforts); Jeremy W. Peters, *Subtler Entry from Masters of Attack Ads*, N.Y. TIMES (May 22, 2012), http://www.nytimes.com/2012/05/22/us/politics/new-crossroads-gps-ad-takes-a-soft-shot-at-obama.html?pagewanted=all&_r=1& (describing American Crossroads's ad testing and message development); Ken Thomas, *A Permanent Campaign? President Obama Will Turn His Re-election Organization into a Group to Back His Agenda*, ASSOCIATED PRESS (Jan. 18, 2013, 12:25 AM), <http://www.nydailynews.com/news/politics/obama-wages-permanent-campaign-article-1.1242364> (describing OFA's permanent staff and campaign infrastructure); Peter Wallsten & Tom Hamburger, *Conservative Groups Reaching New Levels of Sophistication in Mobilizing Voters*, WASH. POST (Sept. 20, 2012), http://www.washingtonpost.com/politics/decision2012/conservative-groups-reaching-new-levels-of-sophistication-in-mobilizing-voters/2012/09/20/3c3cd8e8-026c-11e2-91e7-2962c74e7738_story.html (describing get-out-the-vote efforts by conservative outside groups in the 2012 election).

³ For instance, for the first time since political scientists began tracking this data, the most moderate Republican is now considerably more conservative than the most moderate Democrat. For important work on polarization trends, see generally KEITH T. POOLE & HOWARD ROSENTHAL, *IDEOLOGY & CONGRESS* (2d rev. ed. 2007); SEAN M. THERIAULT, *PARTY POLARIZATION IN CONGRESS* (2008); *POLITICS TO THE EXTREME: AMERICAN POLITICAL INSTITUTIONS IN THE TWENTY-FIRST CENTURY* (Scott A. Frisch & Sean Q Kelly eds., 2013); Christopher Hare, Nolan McCarty, Keith Poole, Howard Rosenthal, *Polarization Is Real (and Asymmetric)*, MONKEY CAGE (May 15, 2012), <http://themonkeycage.org/2012/05/15/polarization-is-real-and-asymmetric>. For a thoughtful analysis of this trend's relationship to political regulations and election law, see also Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011).

⁴ For an account of this trend, see generally MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME*

Republican Party moving dramatically to the right, the differences between Democrats and Republicans are starker and clearer for voters than they have been for several generations.⁵ Much has been made of the rise of “unaffiliated” voters, who officially refuse to call themselves Democrats or Republicans.⁶ But in reality, however, most of these voters are strongly attached to one party or the other; they just don’t say so when initially asked about their party affiliation.⁷

Despite the strong ideological ties between voters and their parties, party organizations are becoming weaker. As John Boehner’s near-constant travails with the House Republicans have shown, party leaders are less able to maintain coalitions within their own parties or build them with their counterparts on the other side of the aisle. And all the while, the shadow parties are becoming stronger. These observations lead to interesting questions for policymakers and courts alike about the shape party politics will take in the future. In a forthcoming article in the *Supreme Court Review*,⁸ we will explore some of those questions in greater depth. Here, we’ll just note some of the questions that interest us without providing anything akin to a definitive answer. All three questions center on the relationship between the “shadow parties” and the formal parties: (1) How are the shadow parties changing party politics? (2) Will *McCutcheon* reverse this trend? (3) If not, why should we care?

REPUBLICANS (2009).

⁵ These polarizing changes took place on both sides, but they were asymmetric in magnitude: By almost every measure, Republicans moved further right than Democrats moved left. See Norm Ornstein, *Yes, Polarization Is Asymmetric—and Conservatives Are Worse*, ATLANTIC (June 19, 2014, 10:17 AM), <http://m.theatlantic.com/politics/archive/2014/06/yes-polarization-is-asymmetric-and-conservatives-are-worse/373044>.

⁶ The numbers of such voters, in opinion surveys, have indeed risen rapidly. See, e.g., Jeffrey M. Jones, *Record-High 42% of Americans Identify as Independents*, GALLUP POL. (Jan. 8, 2014), <http://www.gallup.com/poll/166763/record-high-americans-identify-independents.aspx> (“[T]he general trend in recent years, including the 2012 election year, has been toward greater percentages of Americans identifying with neither the Republican nor the Democratic Party, although most still admit to leaning toward one of the parties.”).

⁷ This is not a new point, but its salience only increases as the number of independent voters continues to rise. See, e.g., BRUCE E. KEITH ET AL., *THE MYTH OF THE INDEPENDENT VOTER* 23–24 (1992) (explaining that the vast majority of nominally independent voters in fact lean strongly one way or the other—and vote that way).

⁸ For an in-depth discussion of these issues, see Joseph Fishkin & Heather K. Gerken, *The Party’s Over: McCutcheon, Shadow Parties, and the Future of the Party System*, 2014 SUP. CT. REV. (forthcoming Jan. 2015).

I

HOW ARE SHADOW PARTIES CHANGING PARTY POLITICS?

If you are going to talk about party politics, you first have to start with the question that law professors, with their penchant for categorization, would ask: What's a political party? The question isn't nearly as silly as it sounds, and it has deep and pragmatic implications for our project. Shadow parties are obviously separate from the formal, legal party apparatus. But we think any definition of "the party" that excludes groups run by consummate party insiders like Jim Messina and Karl Rove—groups that perform many of the same functions as the traditional parties—is formalistic to the point of being inaccurate.

So what *is* a party? Borrowing from law professors like Michael Kang and political scientists like Seth Masket, we think of the parties as complex ecosystems, with different power centers and nodes of influence and multiple points of entry.⁹ The formal party organization is part of it, but so are independent entities—not just shadow parties, but the National Rifle Association, teachers' unions, and the Heritage Foundation.¹⁰ Officeholders are also part of this ecosystem, and so are donors and activists. They all constitute what we term the *party writ large*. They have enough interests in common to play for the same team, but on many issues their views or interests diverge, and they pull the party in different directions.

In our view, then, the emergence of these major independent groups is important to the party writ large. We don't think of the independent groups as shifting power "away" from the party, but as shifting power *within* the party. Shadow parties are shifting power away from the formal party structure, to be sure. But they are still part of the party writ large. What's shifting is the center of gravity within the parties.

Shifts like this happen semi-regularly. Sometimes they're the result of changes internal to the party, and sometimes they're the result of external shocks (such as new campaign-finance regulations). Sam Issacharoff's astute piece in this symposium offers a great example, as he describes how the soft-money regime empowered the

⁹ See generally Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131 (2005); Kathleen Bawn et al., *A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics*, 10 PERSP. ON POL. 571 (2012).

¹⁰ This is why work like Michael Malbin's is so important for tracing the complexities of the current funding environment. See Michael J. Malbin, *McCutcheon Could Lead to No Limits for Political Parties – With What Implications for Parties and Interest Groups?*, 89 N.Y.U. L. REV. ONLINE 92 (2014).

state parties.¹¹ Or think of the Democrats after the McGovern-Fraser Commission reforms.¹² The goal of these reforms was to shift the balance of power over the presidential nominating process, moving it away from the party bosses in smoke-filled rooms and toward the party membership. To some extent, the reforms did just that. The presidential primary process that emerged from the reforms is one in which, as the Democrats saw in 2008, the party membership can exert a lot of influence, even overriding some of the other nodes of power within the party, such as elected officials.¹³ But the ecosystem is more complicated than 2008 suggests. While the current nominating system gives party activists more sway than the old one, the party elites nonetheless continue to exert a great deal of power through what some call the “invisible primary,” which takes place before a single vote is cast.¹⁴

A different example, one that’s even more pertinent to the story we’re telling today, comes from Wisconsin during the first half of the twentieth century.¹⁵ Wisconsin imposed some powerful limits on political parties—limiting their ability to electioneer, raise money, etc. How did the party elites respond? They abandoned the official party structure and joined private “statewide voluntary committees” that supported the party. That’s how they did all the electioneering and fundraising they needed to do—as private associations.

We can see the same phenomenon happening now, with

¹¹ Samuel Issacharoff, *Market Intermediaries in the Post-Buckley World*, 89 N.Y.U. L. REV. ONLINE 105 (2014).

¹² For an overview of the development of the primary process, see, for example, LARRY M. BARTELS, *PRESIDENTIAL PRIMARIES AND THE DYNAMICS OF PUBLIC CHOICE* (1988); NELSON W. POLSBY, *CONSEQUENCES OF PARTY REFORM* 3–40 (1983).

¹³ As the “superdelegate” controversy made clear, much of the party leadership was initially behind Senator Clinton. But the results of the caucuses and primaries eventually pushed the entire party to endorse Senator Obama for the presidency.

¹⁴ See, e.g., MARTY COHEN ET AL., *THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM* 9–16 (2008) (explaining how party elites reasserted control over the presidential nominating process as the long run-up to the primaries became a test of fundraising and elite support that winnows the field and in almost all cases predicts the ultimate presidential nominees); see also Kang, *supra* note 9, at 151–55 (providing an overview of the political science literature on the invisible primary).

¹⁵ The classic account is Frank J. Sorauf, *Extra-Legal Political Parties in Wisconsin*, 48 AM. POL. SCI. REV. 692 (1954) (describing the rise of private political organizations in Wisconsin during the twentieth century); see also LEON D. EPSTEIN, *POLITICS IN WISCONSIN* 28–29 (1958); Steven E. Schier, *New Rules, New Games: National Party Guidelines and Democratic National Convention Delegate Selection in Iowa and Wisconsin, 1968–1976*, 10 PUBLIUS 101, 104–05 (1980) (same). For a similar take on this history, see SETH E. MASKET, *NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES* 44 (2011); Kang, *supra* note 9, at 147.

SuperPACs and nonprofits subbing in for Wisconsin's statewide voluntary committees.¹⁶ Many thought that independent spending organizations would be, well, *independent*—funded by wealthy donors who were interested in pursuing their own agenda, not the party's or the candidate's. But that's not what happened. Political candidates, it turns out, can have their cake and eat it, too. They can take advantage of all of the perks associated with the formal party structure while benefitting from the unlimited fundraising capacity of independent organizations. Just take a look at the 2012 presidential election. Every serious candidate had a SuperPAC, and their SuperPACs were awfully cozy with the campaigns despite the prohibition on coordination. You had companies working for both Romney's campaign and his SuperPAC sharing the same office in Alexandria, for example, with the founder of one of the companies married to a deputy campaign manager for the campaign. The deputy campaign manager, as it happened, also ran a consulting firm out of the same office suite.¹⁷ But don't worry—they said they never shared information!

The suite in Alexandria is but a stand-in for the bigger story about shadow parties. It's not just that the shadow parties are being run by former campaign staff or people close to the candidate. It's not just that high-level campaign operatives and even the candidates themselves are showing up at SuperPAC fundraisers and generally treating them more or less like arms of the campaign. As an important new study out of Ohio State's Moritz College of Law shows, the campaigns have also found both private and public means of cooperating with independent groups without violating formal legal bans on "coordination."¹⁸

Networks are the reason that candidates and outside donors can cooperate behind the scenes. Political elites are highly networked and sophisticated enough to play the coordination game carefully. As the Moritz study explained, members of the campaign leadership "hear things" even though no one from an outside group ever speaks to them directly.¹⁹ One insider explained that messages are passed

¹⁶ Gerken, *supra* note 1, at 915.

¹⁷ Mike McIntire & Michael Luo, *Fine Line Between 'Super PACs' and Campaigns*, N.Y. TIMES (Feb. 25, 2012), <http://www.nytimes.com/2012/02/26/us/politics/loose-border-of-super-pac-and-romney-campaign.html>.

¹⁸ DANIEL P. TOKAJI & RENATA E.B. STRAUSE, *THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS 2* (2014); *see also* Heather Gerken, *The Political Thriller Published by the Moritz College of Law*, ELECTION L. BLOG (June 18, 2014, 6:07 AM), <http://electionlawblog.org/?p=62416> (reviewing TOKAJI & STRAUSE, *supra*).

¹⁹ TOKAJI & STRAUSE, *supra* note 18, at 65.

through “a friend of a friend of a friend of a friend.”²⁰

Political operatives use public as well as private channels to communicate with one another. One of the deep ironies of the Moritz findings is that the mechanisms long intended to make politics “transparent” are being hijacked to serve nontransparent ends. Any campaign head worth his salt becomes what the Moritz study calls “the conductor”²¹ who signals the campaign’s messaging strategies in surprisingly public ways. Campaigns issue press releases that they know the media won’t pick up—but independent groups will. Campaigns manipulate journalists to send “smoke signals” to outside groups. The high-resolution photos and clips known as “b-roll” footage are often embedded into the website in case an outside group needs good visuals. Campaigns circulate donor lists in advance of FEC disclosure deadlines to help outside groups identify potential donors. Outside groups similarly use public channels to convey hidden messages. Voter alerts and scorecards were intended to help public-interest groups track votes. Now they are used to pressure politicians. If a powerful interest group is tracking this or that vote, politicians pay attention as well. Campaigns also keep a close eye on the spending patterns of outside groups and sometimes hire the same media vendors.²²

As a result of these transparent and nontransparent coordinating devices, the campaigns and the shadow parties are coordinating without “coordinating.” Far from being independent, they are working in tandem to advance candidates and issues. Shadow parties, in short, are doing much of the work of the formal parties nowadays.

You might think that this doesn’t make any real difference. On this view, the shadow parties are just part of a campaign-finance shell game—yet another example of what Pam Karlan and Sam Issacharoff have called the “hydraulics of campaign finance.”²³ Money is flowing through one outlet rather than another, but it’s the same money and it doesn’t make a lot of difference which legal entities it passes through in the end.

We think there’s more to this story, however. Sometimes it matters if money flows through one outlet rather than another. If money moves primarily through the shadow parties rather than the formal parties, this can affect the balance of power inside the party

²⁰ *Id.* at 66–67.

²¹ *Id.* at 66. The facts in this paragraph and the next are all drawn from the Moritz study.

²² *Id.* at 64–69.

²³ Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999).

writ large. Our tentative view is that the shift toward shadow parties affects the balance of power within the party in a significant way. That's because, as we discuss below, the formal parties have more points of entry than the shadow parties. While we do not want to romanticize the formal parties, we do think it is worth recognizing that they are subject to influence by a more varied set of actors, in a way that promotes pluralism within the parties.

The shadow parties are structured differently. They are closed to most and controlled by few. As we note below, we are especially concerned about the possibility that the structural shift from formal parties to shadow parties will shift the balance of power away from *the party faithful* (whose means of influencing the party is volunteering on campaigns, participating in caucuses and conventions, and so on) and toward the entities within the party with the most money, whose means of influencing the party writ large is to contribute or spend.

II

WILL *McCutcheon* REVERSE THE TREND?

You might think that these worries are beside the point now that the Supreme Court has struck down aggregate election-cycle limits on federal campaign contributions in *McCutcheon*.²⁴ In the immediate wake of the opinion, there was a lot of discussion suggesting that the Supreme Court's decision in *McCutcheon* is a salutary development that will help reverse the shadow party trend.

We understand the argument. The emergence of shadow parties obviously owes something to campaign-finance deregulation—especially the *SpeechNow.org* case which, following on from *Citizens United*,²⁵ lifted restrictions on independent spending by PACs and thus gave us our current SuperPACs.²⁶ As the always-thoughtful Bob Bauer has reminded us, these trends can be traced back all the way to the 1990s.²⁷ Money and power move through the system through any outlet available, and *McCutcheon* has vastly expanded the capacity of the pipes that move money into the party.

So will *McCutcheon* reroute the money back to the formal

²⁴ *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

²⁵ 558 U.S. 310 (2010).

²⁶ *Speechnow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

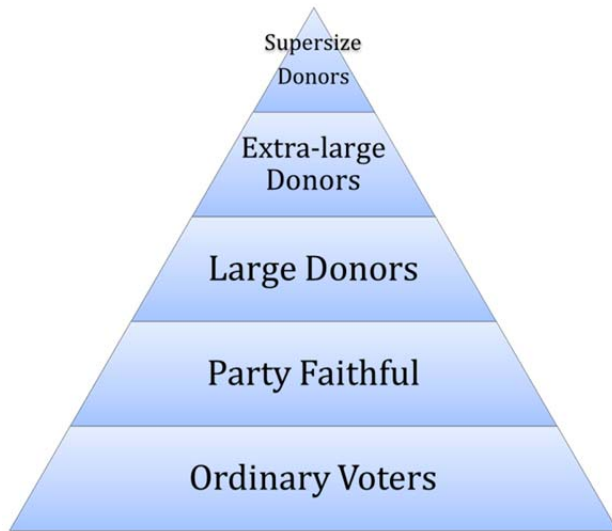
²⁷ Bob Bauer, *The Troubles of Political Parties and Misreadings of Citizens United*, MORESOFTMONEYHARDLAW.COM (June 2, 2014), <http://www.moresoftmoneyhardlaw.com/2014/06/troubles-political-parties-misreadings-citizens-united/>.

parties? A fair number of commentators seem to think so.²⁸ After all, many have complained that the formal parties have been at a fundraising disadvantage during the last few years: They were stuck raising limited funds, while SuperPACs and other shadow party entities could raise unlimited funds. As a result, even those who didn't agree with *McCutcheon* saw a silver lining in the case. The idea is that by removing the aggregate contribution limits, *McCutcheon* will do much to restore the formal parties to parity with the shadow parties. Indeed, many predicted that we will see a lot of money that would have gone to outside groups flowing instead into the formal parties, campaigns, and leadership PACs. This view is fast becoming conventional wisdom in the field.

There's clearly something to this argument, but we have doubts about how far it really goes. We doubt that OFA or Crossroads are going to close up shop and tell their donors to give to the Democratic National Committee or the Republican National Committee instead. At the margins, *McCutcheon* may strengthen the formal parties at the expense of shadow parties, but we are skeptical about the magnitude of this effect.

To understand our argument, it helps to move away from simple dichotomies, like the party elites versus ordinary members, or donors versus voters. We imagine there are several different strata of supporters for a political party:

²⁸ See, e.g., David Brooks, *Party All the Time*, N.Y. TIMES (Apr. 3, 2014), <http://www.nytimes.com/2014/04/04/opinion/brooks-party-all-the-time.html>; Richard L. Hasen, *How "the Next Citizens United" Could Bring More Corruption—but Less Gridlock*, WASH. POST (Feb. 21, 2014), http://www.washingtonpost.com/opinions/how-the-next-citizens-united-could-bring-more-corruption—but-less-gridlock/2014/02/21/a190d1c6-95ab-11e3-afce-3e7c922ef31e_story.html; Ray LaRaja, *The McCutcheon Decision Could Be Good News After All*, WASH. POST (Apr. 3, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/04/03/the-mccutcheon-decision-could-be-good-news-after-all>; Nathaniel Persily, *Bringing Big Money out of the Shadows*, N.Y. TIMES (Apr. 2, 2014), <http://www.nytimes.com/2014/04/03/opinion/bringing-big-money-out-of-the-shadows.html>.



At the bottom of the pyramid, we have *ordinary voters* who support the party. Occupying the next level of the pyramid are the *party faithful*. These people are a lot like ordinary voters, except they invest their time and energies in campaigns. They volunteer, knock on doors, show up to caucuses. They do more than just vote, and as a result they have more influence. Small donors, we assume, are mostly drawn from these two groups. Needless to say, someone who gives only \$20 or \$50 to campaigns (or for that matter even \$500) doesn't have to worry about any campaign-finance regulation, now or in the foreseeable future. Any limit low enough to affect them would not be upheld.²⁹ Indeed, campaign-finance regulation only *benefits* this group, at least to the extent that it means they're not drowned out as much by folks higher in the pyramid.³⁰

So let's turn to the *large donors*, the ones who might want to give somewhat more than \$2600 (or \$5200) to a candidate but can't because those are the maximum individual contribution limits, which are still good law. We assume that there are quite a few donors in this group. But note that they weren't bumping up against the *aggregate*

²⁹ See *Randall v. Sorrell*, 548 U.S. 230 (2006) (striking down, *inter alia*, Vermont's state contribution limit of \$400 for statewide candidates in a two-year election cycle).

³⁰ We know there's no such thing as my speech drowning out your speech—but in *Arizona Free Enterprise*, the Court seemed to take a different view. See *Ariz. Free Enter. Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806 (2011) (striking down an Arizona state election regulation that provided matching funds for publicly financed opponents of self-funding candidates when those self-funded campaigns or their independent supporters spent above the publicly funded candidates' initial allotment).

limits. So they aren't affected by *McCutcheon*.

McCutcheon affects the next tier. These are the *extra-large donors*—the people, like Shaun McCutcheon, who want to give six-figure amounts in a single cycle to candidates, party committees, leadership PACs, etc. It's hard to know how many donors like McCutcheon exist. In 2012, only 646 donors hit the maximum.³¹ For them, *McCutcheon* matters.

The real money in the election cycle, however, comes from the *supersize donors* who occupy the top tier—the multimillionaires and billionaires. If you're George Soros or Sheldon Adelson, and you want to spend seven- or eight-figure sums in one election cycle, then *McCutcheon* will make little difference to you. In the 2012 cycle, for example, Adelson and his wife spent approximately \$93 million.³² Even with all the scenarios Justice Breyer spun out in his *McCutcheon* dissent, there simply aren't enough candidates and state parties in the whole country to absorb \$93 million at \$5200 a pop.³³ If you want to spend that kind of money, you're going to do it through the shadow parties.

Even if you didn't have to use the shadow parties, why wouldn't you? If you create your own shadow party entity, your contributions go to a group that unambiguously answers to you. You're the one with ultimate authority over both personnel and major strategic decisions. And you probably have a good deal of confidence (warranted or not) in your ability to steer organizations. And supersize donors face no real costs, in terms of power and influence, from using shadow party vehicles rather than the formal party: when the funding is on this scale, every candidate and elected official pays attention.

If you're a Shaun McCutcheon, in contrast, you *can't* set up your own shadow party group. With your budget, it would have just a handful of employees, and none of them would be Karl Rove or Jim Messina. You can't afford them. But for the top tier of donors who *can* afford to hire those guys, there's little reason to work within the formal party, where decisions will get made by people who have to

³¹ Bob Biersack, *McCutcheon's Multiplying Effect: Why an Overall Limit Matters*, OPENSECRETS.ORG (Sept. 17, 2013), <https://www.opensecrets.org/news/2013/09/mccutcheons-multiplying-effect-why>.

³² Julie Bykowicz, *Adelson Wooed by Republican Presidential Prospects at Vegas Meet*, BLOOMBERG (Mar. 30, 2014, 12:00 AM), <http://www.bloomberg.com/news/2014-03-29/republican-presidential-hopefuls-in-vegas-to-woo-donor-adelson.html>.

³³ See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1472 (2014) (Breyer, J., dissenting) (describing three "methods for using today's opinion to evade the law's individual contribution limits").

answer to constituencies other than you. When Adelson recently had the 2016 Republican candidates out to Las Vegas to kiss his ring, he had no reason to involve the RNC.³⁴ Even if every Adelson were to give, say, a few million dollars to one party or another just as a “gimme,” the odds are that they will still be putting a great deal more into the shadow parties.

Those who are betting on *McCutcheon* to strengthen the formal parties are betting on one of two things. Either they think more Shaun McCutcheons exist than we do, or they think that—contrary to arguments we outlined above—the Adelsons and Kochs will allocate a large percentage of their spending to the parties. It’s hard to know who is right, of course, especially as it always takes a while for campaign-spending patterns to catch up with the law. But the early results aren’t particularly compelling for those who thought *McCutcheon* was going to matter. The GOP has formed only a handful of joint fundraising committees, and the amounts involved aren’t that far above the old aggregate limits.³⁵ The Democrats haven’t even bothered to form such organizations.³⁶ We expect this to change (the parties rarely leave a fundraising opportunity unexploited). But we think that the parties’ lackadaisical attitudes may reflect an underlying reality: There aren’t as many McCutcheons out there as some commentators thought. That means the shadow parties will continue to grow in importance over the next election cycles.

III

WHY SHOULD WE CARE?

If our empirical predictions are correct—if the shadow parties continue to grow in influence and *McCutcheon* doesn’t level the playing field—why should we care? Set aside the worries about dark

³⁴ See Matea Gold & Philip Rucker, *Billionaire Mogul Sheldon Adelson Looks for Mainstream Republican Who Can Win in 2016*, WASH. POST (Mar. 25, 2014), http://www.washingtonpost.com/politics/billionaire-mogul-sheldon-adelson-looks-for-mainstream-republican-who-can-win-in-2016/2014/03/25/e2f47bb0-b3c2-11e3-8cb6-284052554d74_story.html (describing private meetings between Adelson and potential 2016 Republican presidential candidates).

³⁵ Robert K. Kelner, Commentary, *The Practical Consequences of McCutcheon*, 127 HARV. L. REV. F. 380, 383 (2014), http://cdn.harvardlawreview.org/wp-content/uploads/2014/06/vol127_Kelner.pdf.

³⁶ See Byron Tau, *GOP Launches New Big Money Effort*, POLITICO (Aug. 5, 2014, 5:02 PM), <http://www.politico.com/story/2014/08/republicans-targeted-state-victory-fundraising-109724.html> (describing the Targeted States Victory Committee, a 2014 Republican official-party joint fundraising effort that solicits checks of up to \$162,400 to be distributed to the national party and thirteen battleground state parties).

money's hidden influence. Imagine that the shadow parties were required to disclose donors but otherwise retained their fundraising advantage. We would still worry about which direction the money flowed. That's because power and money run together in our political system. It would be a mistake to view the dynamics of party regulation purely in terms of money finding its level. The people at the different strata of the pyramid we described may all be on the same team, but that doesn't mean they all agree. Sometimes they disagree strenuously. The question of who's going to win those disputes—who's going to steer this unwieldy and complex entity that we call the *party writ large*—depends on which forms of influence have more weight. And that, in turn, depends on where the center of gravity lies within the party writ large.

This isn't just an empirical question, but a normative one. We've been struck by how little political theory has to say about who *ought* to steer the party—or, for that matter, who ought to influence candidates. On one side, there's an equality view, which effectively boils down to a rough rule of one party member, one vote. On this view, it's only the voters—the party in the electorate—who ought to be in the driver's seat. Any time donors are influencing the direction of the party, that's a form of corruption.

What's striking about *McCutcheon* is how firmly it rejects this view while (implicitly) endorsing another. The first sentence of the decision says that “[t]here is no right more basic in our democracy than the right to *participate* in electing our political leaders.”³⁷ As retired Justice Stevens pointed out, this sentence is totally off topic, unless you want to equate donating with more traditional forms of political participation, like voting or volunteering.³⁸ Later on the decision repeatedly refers to donors as “constituents,” and says that responsiveness to these donor-constituents is “a central feature of democracy” that “is key to the very concept of self-governance through elected officials.”³⁹

While *McCutcheon*'s account is problematic, so is the pure equality view. It's not only naïve, but foolishly simplistic given that most voters are not politically engaged. It's a traditional point in the

³⁷ *McCutcheon*, 134 S. Ct. at 1440–41 (emphasis added).

³⁸ Adam Liptak, *Justice Stevens Suggests Solution for 'Giant Step in the Wrong Direction,'* N.Y. TIMES (Apr. 21, 2014), http://www.nytimes.com/2014/04/22/us/politics/justice-stevens-prescription-for-giant-step-in-wrong-direction.html?_r=0 (“The first sentence here,” [Justice Stevens] said, “is not really about what the case is about” and that it’s wrong to suggest that “the voter is less important than the man who provides money to the candidate.”).

³⁹ *McCutcheon*, 134 S. Ct. at 1441, 1462.

literature that party elites wield more power over elections than the electorate, and most people in the field think it's a good thing, too. Party elites do know a great deal more about steering the party than the electorate. Most experts would agree that they ought to exercise more influence than the equality view, taken to its logical limit, would allow.

We're most interested in a group that has largely been neglected in this debate—the group that stands *between* the electorate and the elites, between the people and the party. We're interested in the party faithful. If everything's up to the electorate or the elites, there's no room for the party faithful to exert any special influence. Indeed, our fear is that the power shift from the formal parties to the shadow parties is most likely to undermine the influence the party faithful wield.⁴⁰

That would be unfortunate, in our view. The party faithful are the backbone of the party. They generate much of its energy. They carry out its ground game. And they can check the party elites on behalf of the electorate. As one of us has noted elsewhere, the party faithful help solve a conundrum in politics.⁴¹ Given that voters can't monitor their representatives, how does the principal control the agent? We often cast the political parties in this role because they enforce party discipline and punish defectors. To invoke the Latin phrase, *quis custodiet ipsos custodes*? Who will guard the guardians?⁴² One possible answer is the party faithful. They are everyday voters who have chosen to invest their energies in the parties and, as a result, have one foot in each world. They can speak for everyday voters because they are everyday voters. But they are more likely to be heard because they speak from inside the campaign, not outside of it. Presence matters. As one of us has observed elsewhere, the influence of the party faithful comes in part from “being under one roof, interacting regularly with the campaign leadership. We are social animals. Our views are shaped by those around us whether we are aware of it or not.”⁴³

⁴⁰ We don't want to exaggerate this claim, however, because we take seriously the point Kate Andrias makes in this symposium—that the party faithful's decline was occurring even before the rise of the shadow parties. Kate Andrias, *Hollowed-Out Democracy*, 89 N.Y.U. L. REV. ONLINE 48, 48–50 (2014). Nonetheless, we worry that the shadow parties are far more closed off to the party faithful than formal party structure, for all of its shortcomings, has ever been.

⁴¹ Gerken, *supra* note 1, at 921.

⁴² For an overview of the literature and an astute take on the question, see Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999).

⁴³ Gerken, *supra* note 1, at 922.

The shift from the formal parties to the shadow parties is likely to undermine the party faithful's influence. One way to think about this problem is to return to one of our early observations—that the party is a complex ecosystem. The formal parties in particular are highly complex entities, with national, state, and local layers that mirror our federalist system and a variety of methods of selecting leaders at each level. When mobilized for campaigns, the formal parties have enormous needs of many different kinds, each of which becomes a point of entry: you can be part of the party, and influence it more than an ordinary voter, by going door to door, by aggregating donations, by spending every spare hour working on a campaign. These multiple points of entry are useful from a pluralist point of view. They accommodate different types of people. They make the party more open than it would otherwise be, more capable of change in response to various different combinations of time, effort, enthusiasm, and (for good or ill) ability to pay. The formal parties, in this way, are reasonably pluralistic in terms of avenues of influence. The party faithful have a variety of routes for influencing the leadership, and that's all to the good.

The shadow parties are different. They are structured so that they ultimately answer to their funders alone. As a result, they provide a more efficient mechanism for those funders to exercise influence than would be possible if everything had to flow through formal party organizations. But the shadow parties are, by and large, completely closed to the party faithful. The people that control the shadow parties are either the donors who fund them or the elites who run them. The party faithful remain hived off in the formal party structure—which, with each election cycle, is becoming less important to the direction taken by the party writ large.

Returning to the other observation with which we began, the question of party control is particularly fraught at this moment. Even as the center of gravity within the party writ large is shifting, the parties *as brands* could hardly be stronger. In a world of weak formal parties and strong shadow parties, these powerful brands are the intellectual property of no one. With primary elections for nearly every important partisan office, the Democratic or Republican mantle is available to anyone who can convince a partisan group of voters that they are entitled to take it up. That system is very small-d democratic . . . as long as you've got the money. Because all that convincing turns out to be a very expensive process—one in which the shadow parties are playing an increasingly central role.

CONCLUSION

For all of these reasons, we worry about how campaign finance regulation (and deregulation) risks flattening a complex and pluralistic system in a way that cuts out the party faithful, leaving only the big donors and the mass voting public—the top and bottom of the pyramid—with nobody in between. That kind of politics may be well-adapted to (or even an outgrowth of) a world dominated by broadcast media. But we think it's a hollowed-out kind of politics, missing some of the energy and engagement and forms of influence that should matter to all of us.